NO. 48800-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN MAYFIELD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Stephen Warning, Judge
The Honorable Michael Sullivan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THIS COURT SHOULD CONSIDER WHETHER THE ATTENUATION DOCTRINE IS COMPATIBLE WITH ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.

In arguing the federal attenuation doctrine comports with article I, section 7 of the Washington Constitution, the State relies heavily on the dissent in State v. Ibarra-Cisneros, 172 Wn.2d 880, 263 P.3d 591 (2011), though the State does not always cite it as such. Br. of Resp't, 6-7. For instance, the State asserts, "'[t]he federal attenuation doctrine, an exception to the exclusionary rule, is consistent with article I, section 7 of the Washington Constitution.'" Br. of Resp't, 7 (quoting Ibarra-Cisneros, 172 Wn.2d at 906).

What the State does not acknowledge is this statement is from the dissent, which no other justice joined. Ibarra-Cisneros, 172 Wn.2d at 906, 916 (J.M. Johnson, J., dissenting). The majority in Ibarra-Cisneros declined to decide whether the attenuation doctrine is consistent with article I, section 7 based on the limited record and briefing. 172 Wn.2d at 884 ("Nor will we engage in a gratuitous examination of the exclusionary rule under federal and state law, including the question of whether the attenuation doctrine is consistent with article I, section 7 of the Washington State Constitution.").

More recently, the supreme court has recognized application of the attenuation doctrine under our state constitution remains an open question. See State v. Smith, 177 Wn.2d 533, 545, 303 P.3d 1047 (2013) (plurality opinion) (deciding the case under the "save life" exception to the warrant requirement rather than the attenuation doctrine); id. at 552 (Madsen, C.J., concurring in the result) ("The concurrence's use of the attenuation doctrine is equally concerning because we have not explicitly adopted it under article I, section 7." (citing State v. Eserjose, 171 Wn.2d 907, 919, 259 P.3d 172 (2011)); id. at 553 (González, J., concurring in the result) ("I recognize this court has shown some recent reluctance to adopt the attenuation doctrine."); id. at 559-61 (Chambers, J., dissenting) ("I recognize the [attenuation] issue has badly split this court. In Eserjose, three justices gave their unqualified signatures to an opinion adopting it; four justices, including this dissenting justice, lent their unqualified signatures to an opinion rejecting it . . . Whatever else can be said about Eserjose, we did not use it to adopt the attenuation doctrine."). This case squarely presents the issue and so this Court should address it.

2. EVEN UNDER THE ATTENUATION DOCTRINE, MAYFIELD'S CONSENT TO SEARCH DID NOT PURGE THE TAINT OF THE ILLEGAL SEIZURE.

The State concedes "the trial court correctly concluded that although Deputy Nunes['s] initial purpose was to determine what the Appellant was

doing at Mr. Salte's residence, his continued contact with the Appellant developed into a drug investigation absent any reasonable and articulable suspicion." Br. of Resp't, 8-9. This Court should accept the State's concession for the reasons articulated by the trial court and in Mayfield's opening brief. RP 60-62; CP 20; Br. of Appellant, 13-20. Moreover, the trial court's unchallenged findings of fact are now verities on appeal, and they support the trial court's conclusion of law that the drug investigation was illegal. State v. Ross, 106 Wn. App. 876, 880, 26 P.3d 298 (2001).

Warrantless searches and seizures, like here, are per se unreasonable. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The State therefore bears the burden of demonstrating a warrantless search or seizure falls within one of the exceptions to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). The State has failed to do so in its extremely cursory analysis on appeal. See Br. of Resp't, 8-9.

As it did below, the State asserts Ferrier warnings were "a significant intervening factor and, under these particular set of facts, satisfy the requirement for constitutional warnings." Br. of Resp't, 9. The State claims "[w]here defendants have been advised of their right to refuse consent to a search or to limit the scope of a search, courts have held that the consent was not tainted by the prior illegal detention." Br. of Resp't, 9 (citing State v. Gonzales, 46 Wn. App. 388, 399, 731 P.2d 1101 (1985); State v. Jensen, 44

Wn. App. 485, 490-91, 723 P.2d 443 (1986)). Contrary to the State's assertion, however, Jensen and Gonzales do not stand for the proposition that Ferrier warnings, alone, are sufficient to attenuate a search from an illegal search or seizure.

As discussed in the opening brief, the holding of Jensen is inconsistent with the U.S. Supreme Court decisions in Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), and Taylor v. Alabama, 457 U.S. 687, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982). Br. of Appellant, 44-45. Furthermore, it was not Ferrier warnings alone that purged the taint of the prior illegal search in that case. Rather, Jensen was lawfully arrested, informed of his Miranda rights, orally consented twice to the search, signed a written consent to search form two hours after the initial illegal search, and was allowed to call his sister. Jensen, 44 Wn. App. at 487, 490-91. By contrast, Mayfield orally consented only once to the search of his vehicle, immediately after the illegal seizure.

Gonzales is also distinguishable. There, Gonzales was stopped for a traffic infraction, but was arrested on burglary charges after he disclaimed any connection to property clearly visible in his car. 46 Wn. App. at 391-92. Because the arrest was made before the police verified that a burglary had actually occurred, it was not based on probable cause and was therefore illegal. Id. at 396. After the illegal arrest, however, Gonzales spontaneously

volunteered to allow police to search his home, and subsequently signed a written consent to search form. Id. at 392. Gonzales was also informed of his Miranda rights and voluntarily waived them. Id.

The court concluded Gonzales's consent was not tainted by the illegal arrest because he volunteered his consent rather than being asked for it. Id. at 398. By contrast, Mayfield did not spontaneously volunteer consent to search his person or his truck, nor did he sign a written consent form. He orally consented only after being asked by Deputy Nunes. The unique facts of Gonzales clearly do not apply here.

Finally, the State acknowledges Brown and Taylor but asserts they do not control because "the main issue in contention is not a confession." Br. of Resp't, 9. This is a distinction without a difference. The State misses the broader holdings of Brown and Taylor—that voluntariness is not dispositive in the attenuation inquiry. Taylor, 457 U.S. at 690-91; Brown, 422 U.S. at 602-03.

Miranda warnings are meant to ensure that a confession is knowingly and voluntarily given. Ferrier is a corollary to Miranda: Ferrier warnings are meant to ensure that a consent to search is knowingly and voluntarily given. Brown and Taylor held voluntary confessions following Miranda warnings do not, alone, purge the taint of an illegal seizure. Br. of Appellant, 40-45; see also State v. Soto-Garcia, 68 Wn. App. 20, 27, 841 P.2d 1271 (1992) ("A

consent to search obtained through exploitation of a prior illegality may be invalid even if voluntarily given."). There is no basis to hold voluntary consents to search following Ferrier warnings, alone, purge the taint of an illegal seizure.

Brown and Taylor are not distinguishable because they involved confessions rather than consents to search. Indeed, Washington courts have repeatedly applied them in consent to search cases. See, e.g., State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991); Soto-Garcia, 68 Wn. App. at 27; Jensen, 44 Wn. App. at 490. The State offers no argument and no explanation for why this Court should hold otherwise.

To adopt the State's position would essentially sanction police fishing expeditions so long as Ferrier warnings are given. Police could conceivably approach random individuals on the street or knock on their front door, without cause, and ask to search their person, car, or home, without repercussion, so long as they were informed of their right to refuse consent. See Brown, 422 U.S. at 602-03 (recognizing this very problem would reduce the constitutional guarantee against unlawful searches and seizures to "'a form of words'" (quoting Mapp v. Ohio, 367 U.S. 643, 648, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961)). The U.S. Supreme Court has condemned such a result, and so must this Court.

B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse Mayfield's conviction and remand for the trial court to dismiss the charge with prejudice.

DATED this 23rd day of March, 2017.

Respectfully submitted,

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